SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-633

CELANESE CORPORATION AND FIBER INDUSTRIES, INC.,
Petitioners,

v.

THE HONORABLE ROBERT W. HEMPHILL, DISTRICT JUDGE,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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This petition stands unopposed by the primary respondent, a district judge whose usurpation of a prerogative not committed to him by any rule or statute, gave rise to its filing.[1] The oppositions filed by the respective opposing parties in the case before him, Duplan et al. ("Duplan") and Deering Milliken Research Corporation et al. ("DMRC") demonstrate that, like the respondent judge,

[1] The Petition is *not* for mandamus as alleged by respondent Duplan (Br. 4), but for certiorari from the Fourth Circuit's denial of mandamus. There is no contention that the Fourth Circuit exceeded its jurisdiction or failed to perform a ministerial act. Rather, the contention is that the Fourth Circuit committed grievous error of law on issues of controlling importance incident the administration of the lower federal courts and that its action ought to be reviewed under the certiorari power.

these parties can find no real justification for his excesses either in Rule 26(c) upon which the Fourth Circuit was mistakenly induced to rely[2] or elsewhere. Hence, they have been driven to rewrite the facts to postulate a situation which, though fanciful, *can* be at least superficially justified.

This reply brief is advanced to set the record straight. Specifically,

1. It is not "hypothesis" (DMRC Br. 6) or "colorful labels . . . by disappointed litigants" (DMRC Br. 5) that petitioners' access to relevant documents was conditioned by the respondent judge upon payment of punitive sums. The respondent judge himself emphasized that this was so. In his order he said (Pet. 4a) that petitioners must "post . . . a surety bond, in the *penal* sum[3] of $50,000.00, conditioned upon their payment of such sums, to such parties and/or the court, as the

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[2] See Pet. 13, 17-18. Rule 26(c) is applicable *only* "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown"—conditions admittedly not met in this case incident either the original oral *sua sponte* blanket protective order or its "modification" of January 23, 1973 (Pet. 2a). Neither reason nor authority supports the proposition that these express conditions are void because the district courts have separate power "too well established to requite citation" to enter protective orders at will as Duplan alleges (Br. 6).

Yet grave danger exists that Rule 26(c) will continue to be misapplied by the district courts within the Fourth Circuit to justify arbitrary protective orders entered without good cause for the benefit of the courts and favored parties. See in this connection, the order (1b to 3b *infra*) of the District Court for the Middle District of North Carolina entered November 15, 1973 under cloak of Rule 26(c), quashing subpoenas to take admittedly relevant oral deposition testimony for use in the Florida case based on unverified allegations of inconvenience and upon the fact that the witness previously gave testimony in the South Carolina case.

[3] Duplan cites no authority for its assertion that this is a "traditional provision" (Br. 5). Suffice it to say that petitioners' trial counsel signing his reply brief have no confirmatory experience and could find no supporting authority even after considerable effort.

Court may determine as appropriate *in view of the fact that the Petitioners have borne no expense, made no arrangements, and suffered none of the difficulties of getting to and from the depositions, and furnishing counsel to examine.*" Similar but even more positive statements (4b to 6b *infra*) of intention by respondent to assess against petitioners a portion of expenses suffered by the South Carolina parties and the South Carolina court incident discovery in which petitioners were precluded from participating[4] appear in the transcript of February 14, 1973 which is a part of the record. Clearly, these are *not* the ordinary costs of producing and copying documents contemplated by the apposite discovery rules—and no amount of mislabelling by Duplan (Br. 4-5) and DMRC (Br. 5-6)[5] will make them so.

2. As shown by the letters reproduced *infra* (pp. 7b to 16b) petitioners do not even now have access to all of the South Carolina documentary materials sought but have been confronted on one occasion after another since inspection of some South Carolina materials was begun on October 22, 1973 with new roadblocks and impediments to their inspection and copying. See esp. pp. 7b and 16b *infra*. Hence it is *not true* that petitioners now have or have ever had, "access to all materials they sought" (DMRC Br. 4). Nor is it certain they ever will unless this Court acts.

3. The fact that the South Carolina parties, like all members of the public, now have and have always had

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[4] Indeed, a motion for leave to participate in depositions of certain French nationals and thus make the depositions admissible in MDL No. 82 was summarily rejected by the respondent judge on "lack of standing" grounds. The North Carolina order purportedly under Rule 26(c) reproduced *infra* at 1b to 3b refuses petitioners the right to take the deposition of the ARCT companies (DMRC Co-parties) through one of the same witnesses.

[5] A suggestion (*infra*, 14b) made since the Petition was filed that DMRC counsel, Mr. Greenfield, agree that DMRC will *not* seek penalities, but only reasonable copying costs has never been answered.

what DMRC calls "unfettered access" (Br. 2) to many thousands of records and documents filed with the Office of the Clerk of the Southern District of Florida incident MDL Docket No. 82 has been artfully disregarded—yet this single fact among all others casts in sharp relief the harassment, oppression and punishment to which the respondent judge has, without prerogative, subjected petitioners just for seeking rights enjoyed by every South Carolina party as a matter of course. As the Petition demonstrates (4-5), the Florida and South Carolina cases involve competing patents on the same false twist texturing subject matter and parallel antitrust claims; hence, accessibility of Florida documents to the South Carolina parties is of major importance.

The situation is aggravated by the fact that the *Florida* court has recognized the relevance of the South Carolina materials to the *Florida* case and repeatedly emphasized its desire that they be available in the Florida proceeding.[6] See also the affidavit, filed in the Florida court, of counsel who has, since October 22, 1973, been examining the available portion of the South Carolina documents (17b *infra*) verifying the relevancy of these materials to the Florida case.

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[6] The most recent expression was an order entered October 9, 1973 refusing to vacate petitioners' notice to take the deposition of the ARCT companies through their president. See notes 2 p. 2 and 4 p. 3 *supra*. The motion to vacate was premised on the fact that petitioners' discovery period in Florida ended in March 1973; it was opposed on the ground that formal efforts to take the testimony and obtain the parallel relevant documents have been going forward since at least July 1972.

CONCLUSION

No cognizable ground for denying the petition has been advanced. The writ should be granted to resolve the scope of the district courts' power under Rule 26(c) to impose alleged protective orders and to emphasize the duty of federal district courts to aid rather than obstruct justice in sister courts.

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